

AMENDED IN SENATE APRIL 2, 2013

**SENATE BILL**

**No. 145**

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**Introduced by Senator Pavley**  
(Principal coauthor: Assembly Member Gorell)

January 31, 2013

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An act to amend Section 311.11 of, *and to repeal and add Section 288.2 of*, the Penal Code, relating to sex offenders.

LEGISLATIVE COUNSEL'S DIGEST

SB 145, as amended, Pavley. Sex offenders: child pornography.

*(1) Existing law makes it either a crime for a person, with knowledge that another person is a minor, to knowingly distribute, send, cause to be sent, exhibit, or offer to distribute or exhibit by electronic mail or the Internet any harmful matter, as defined, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or the minor, and with the intent or the purpose of seducing a minor.*

*This bill would instead make it a misdemeanor or a felony for every person who knows, should have known, or believes that another person is a minor to distribute or exhibit harmful matter, as defined, depicting a minor or minors engaging in sexual conduct, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of engaging in sexual intercourse, sodomy, oral copulation, or with the intent that either person touch an intimate body part of the other. The bill would make a violation of these provisions punishable by imprisonment in a county jail not exceeding one year, or in the state prison for 3, 5, or 7 years.*

*If the matter used was harmful matter, as defined, but does not include a depiction of a minor engaged in sexual conduct, or if the matter used was not harmful matter, but did include a depiction of a minor engaged in sexual conduct, the bill would make a violation of these provisions punishable by imprisonment in a county jail not exceeding one year, or in the state prison for 2, 3, or 4 years.*

*If the person used the matter with the intent to engage in sexual conduct with a minor that does not involve sexual intercourse, sodomy, oral copulation, or the touching of an intimate body part of the other person, the bill would make a violation of these provisions punishable by imprisonment in a county jail not exceeding one year, or in the state prison for 18 months, or 2 or 3 years.*

*By increasing the punishment for a crime, this bill would impose a state-mandated local program.*

**Existing**

(2) *Existing* law makes it a felony, punishable by imprisonment in the state prison for 16 months, or 2 or 3 years, or in a county jail for up to one year, or by a fine not exceeding \$2,500, or by both the fine and imprisonment, to knowingly possess or control child pornography, as specified. A subsequent violation of this provision is punishable by imprisonment in the state prison for 2, 4, or 6 years.

This bill would delete the sentencing structure of 2, 4, or 6 years for a subsequent violation of that provision and increase it to 3, 5, or 7 years. This bill would also make it either a felony, punishable by imprisonment in the state prison for 3, 5, or 7 years, or a misdemeanor, punishable by imprisonment in a county jail for up to one year, or by a fine not exceeding \$2,500, or by both the fine and imprisonment, if the person knowingly possesses or controls child pornography, as specified, and the matter contains more than 600 images, as defined, at least 10 of which are images of prepubescent minors or minors under 12 years of age; ~~or the person intends to use the images to persuade, induce, entice, coerce, or facilitate the travel of a minor to engage in sexual activity; or the matter portrays sexual sadism or sexual masochism involving a minor.~~

This bill would make other technical, nonsubstantive, and conforming changes.

Existing law, Proposition 83, as approved by the voters at the November 7, 2006, statewide general election, amended Section 311.11 of the Penal Code. The act authorizes the Legislature to amend its provisions to expand the scope of its application or to increase the

punishments or penalties established by the act by a statute passed by a majority vote of each house thereof.

Because the bill would increase punishments provided in the act by increasing the sentencing for a subsequent possession of child pornography conviction from 2, 4, or 6 years to 3, 5, or 7 years the bill may be passed by a majority vote of each house of the Legislature.

Because a violation of the provisions would be a crime, this bill would impose a state-mandated program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1     SECTION 1. Section 288.2 of the Penal Code is repealed.
- 2     288.2. ~~(a) (1) Every person who, with knowledge that a person~~
- 3     ~~is a minor, or who fails to exercise reasonable care in ascertaining~~
- 4     ~~the true age of a minor, knowingly distributes, sends, causes to be~~
- 5     ~~sent, exhibits, or offers to distribute or exhibit by any means,~~
- 6     ~~including, but not limited to, live or recorded telephone messages,~~
- 7     ~~any harmful matter, as defined in Section 313, to a minor with the~~
- 8     ~~intent of arousing, appealing to, or gratifying the lust or passions~~
- 9     ~~or sexual desires of that person or of a minor, and with the intent~~
- 10    ~~or for the purpose of seducing a minor, is guilty of a public offense~~
- 11    ~~and shall be punished by imprisonment in the state prison or in a~~
- 12    ~~county jail.~~
- 13    ~~(2) A person convicted of a second and any subsequent~~
- 14    ~~conviction for a violation of this subdivision is guilty of a felony~~
- 15    ~~and shall be punished by imprisonment in state prison.~~
- 16    ~~(b) (1) Every person who, with knowledge that a person is a~~
- 17    ~~minor, knowingly distributes, sends, causes to be sent, exhibits,~~
- 18    ~~or offers to distribute or exhibit by electronic mail, the Internet,~~
- 19    ~~as defined in Section 17538 of the Business and Professions Code,~~
- 20    ~~or a commercial online service, any harmful matter, as defined in~~
- 21    ~~Section 313, to a minor with the intent of arousing, appealing to,~~
- 22    ~~or gratifying the lust or passions or sexual desires of that person~~

1 or of a minor, and with the intent, or for the purpose of seducing  
2 a minor, is guilty of a public offense and shall be punished by  
3 imprisonment in the state prison or in a county jail.

4 (2) A person convicted of a second and any subsequent  
5 conviction for a violation of this subdivision is guilty of a felony  
6 punishable by imprisonment in the state prison.

7 (e) It shall be a defense to any prosecution under this section  
8 that a parent or guardian committed the act charged in aid of  
9 legitimate sex education.

10 (d) It shall be a defense in any prosecution under this section  
11 that the act charged was committed in aid of legitimate scientific  
12 or educational purposes.

13 (e) It does not constitute a violation of this section for a  
14 telephone corporation, as defined in Section 234 of the Public  
15 Utilities Code, a cable television company franchised pursuant to  
16 Section 53066 of the Government Code, or any of its affiliates, an  
17 Internet service provider, or commercial online service provider,  
18 to carry, broadcast, or transmit messages described in this section  
19 or perform related activities in providing telephone, cable  
20 television, Internet, or commercial online services.

21 *SEC. 2. Section 288.2 is added to the Penal Code, to read:*

22 288.2. (a) (1) Every person who knows, should have known,  
23 or believes that another person is a minor, and who knowingly  
24 distributes, sends, causes to be sent, exhibits, or offers to distribute  
25 or exhibit by any means, including by physical delivery, telephone,  
26 electronic communication, or in person, any harmful matter that  
27 depicts a minor or minors engaging in sexual conduct, to the other  
28 person with the intent of arousing, appealing to, or gratifying the  
29 lust or passions or sexual desires of that person or of the minor,  
30 and with the intent or for the purposes of engaging in sexual  
31 intercourse, sodomy, or oral copulation with the other person, or  
32 with the intent that either person touch an intimate body part of  
33 the other, is guilty of a misdemeanor, punishable by imprisonment  
34 in a county jail not exceeding one year, or is guilty of a felony,  
35 punishable by imprisonment in the state prison for three, five, or  
36 seven years.

37 (2) If the matter used by the person is harmful matter but does  
38 not include a depiction or depictions of a minor or minors engaged  
39 in sexual conduct, the offense is punishable by imprisonment in a

1 county jail not exceeding one year, or by imprisonment in the state  
2 prison for two, three, or four years.

3 (3) If the matter used by the person includes a depiction or  
4 depictions of a minor or minors engaged in sexual conduct, but is  
5 not harmful matter, the offense is punishable by imprisonment in  
6 a county jail not exceeding one year, or by imprisonment in the  
7 state prison for two, three, or four years.

8 (4) If the matter used by the person is either harmful matter, or  
9 includes a depiction or depictions of a minor or minors engaged  
10 in sexual conduct, or both, and the person intends to engage in  
11 sexual conduct with a minor, or to induce a minor to engage in  
12 sexual conduct, that does not involve sexual intercourse, sodomy,  
13 or oral copulation with the other person, and does not involve  
14 either person touching an intimate body part of the other, the  
15 offense is punishable by imprisonment in a county jail not  
16 exceeding one year, or by imprisonment in the state prison for 16  
17 months, or two or three years.

18 (5) For purposes of this subdivision, each offense described in  
19 paragraphs (2) to (4), inclusive, shall include all elements  
20 described in paragraph (1), except as to the element or elements  
21 modified in each subsequent paragraph.

22 (b) For purposes of this section, “sexual conduct” has the same  
23 meaning as defined in subdivision (d) of Section 311.4.

24 (c) For purposes of this section, “harmful matter” has the same  
25 meaning as defined in Section 313.

26 (d) For purposes of this section, an intimate body part includes  
27 the sexual organ, anus, groin, or buttocks of any person, or the  
28 breasts of a female.

29 (e) Prosecution under this section shall not preclude prosecution  
30 under any other provision of law.

31 (f) It shall be a defense to any prosecution under this section  
32 that a parent or guardian committed the act charged in aid of  
33 legitimate sex education.

34 (g) It shall be a defense in any prosecution under this section  
35 that the act charged was committed in aid of legitimate scientific  
36 or educational purposes.

37 (h) It does not constitute a violation of this section for a  
38 telephone corporation, as defined in Section 234 of the Public  
39 Utilities Code, a cable television company franchised pursuant to  
40 Section 53066 of the Government Code, or any of its affiliates, an

1 *Internet service provider, or commercial online service provider,*  
2 *to carry, broadcast, or transmit messages described in this section*  
3 *or perform related activities in providing telephone, cable*  
4 *television, Internet, or commercial online services.*

5 **SECTION 1.**

6 **SEC. 3.** Section 311.11 of the Penal Code is amended to read:

7 311.11. (a) Every person who knowingly possesses or controls  
8 any matter, representation of information, data, or image, including,  
9 but not limited to, any film, filmstrip, photograph, negative, slide,  
10 photocopy, videotape, video laser disc, computer hardware,  
11 computer software, computer floppy disc, data storage media,  
12 CD-ROM, or computer-generated equipment or any other  
13 computer-generated image that contains or incorporates in any  
14 manner, any film or filmstrip, the production of which involves  
15 the use of a person under 18 years of age, knowing that the matter  
16 depicts a person under 18 years of age personally engaging in or  
17 simulating sexual conduct, as defined in subdivision (d) of Section  
18 311.4, is guilty of a felony and shall be punished by imprisonment  
19 in the state prison, or a county jail for up to one year, or by a fine  
20 not exceeding two thousand five hundred dollars (\$2,500), or by  
21 both the fine and imprisonment.

22 (b) Every person who commits a violation of subdivision (a),  
23 and who has been previously convicted of a violation of this  
24 section, an offense requiring registration under the Sex Offender  
25 Registration Act, or an attempt to commit any of the  
26 above-mentioned offenses, is guilty of a felony and shall be  
27 punished by imprisonment in the state prison for three, five, or  
28 seven years.

29 (c) Each person who commits a violation of subdivision (a)  
30 shall be punished by imprisonment in the state prison for three,  
31 five, or seven years, or shall be punished by imprisonment in a  
32 county jail for up to one year, or by a fine not exceeding two  
33 thousand five hundred dollars (\$2,500), or by both the fine and  
34 imprisonment, if one of the following factors exists:

35 (1) The matter contains more than 600 images that violate  
36 subdivision (a), and the matter contains 10 or more images  
37 involving a prepubescent minor or a minor who has not attained  
38 12 years of age.

39 ~~(2) The person intends to use the matter to persuade, induce,~~  
40 ~~entice, coerce, or facilitate the travel of a minor for the purpose of~~

1 committing an offense listed in subdivision (c) of Section 290, or  
2 has attempted to commit any of the offenses described in this  
3 paragraph.

4 (3)

5 (2) The matter portrays sexual sadism or sexual masochism  
6 involving a person under 18 years of age. *For purposes of this*  
7 *section, “sexual sadism” means the intentional infliction of pain*  
8 *for purposes of sexual gratification or stimulation. For purposes*  
9 *of this section, “sexual masochism” means intentionally*  
10 *experiencing pain for purposes of sexual gratification or*  
11 *stimulation.*

12 (d) It is not necessary to prove that the matter is obscene in order  
13 to establish a violation of this section.

14 (e) This section does not apply to drawings, figurines, statues,  
15 or any film rated by the Motion Picture Association of America,  
16 nor does it apply to live or recorded telephone messages when  
17 transmitted, disseminated, or distributed as part of a commercial  
18 transaction.

19 (f) For purposes of determining the number of images under  
20 paragraph (1) of subdivision (c), the following shall apply:

21 (1) Each photograph, picture, computer, or computer-generated  
22 image, or any similar visual depiction shall be considered to be  
23 one image.

24 (2) Each video, video-clip, movie, or similar visual depiction  
25 shall be considered to have 75 images.

26 ~~SEC. 2:~~

27 *SEC. 4.* No reimbursement is required by this act pursuant to  
28 Section 6 of Article XIII B of the California Constitution because  
29 the only costs that may be incurred by a local agency or school  
30 district will be incurred because this act creates a new crime or  
31 infraction, eliminates a crime or infraction, or changes the penalty  
32 for a crime or infraction, within the meaning of Section 17556 of  
33 the Government Code, or changes the definition of a crime within  
34 the meaning of Section 6 of Article XIII B of the California  
35 Constitution.